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No. 02-403

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

CHRISTINE BEAUMONT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The divided court of appeals' decision in this case holds unconstitutional an important provision of the Federal Election Campaign Act of 1971 (FECA) as applied to a common type of nonprofit advocacy group. Respondents have provided no reason why this Court should not review that decision.

A. The Decision Below Is Inconsistent With This Court's Decisions

As explained in the petition (at 9-10), the court of appeals' decision in this case is difficult to square with this Court's decision in *Federal Election Commission* v. *National Right to Work Campaign*, 459 U.S. 197 (1982) (*NRWC*), and with the Court's discussion of *NRWC* in *Federal Election Commission* v. *Massachu-*

setts Citizens for Life, Inc., 479 U.S. 238 (1986) (*MCFL*). Indeed, Judge Gregory concluded in his dissent that there is no way to "escape the conclusion that *NRWC* is dispositive [in this case] with respect to § 441b's ban on corporate contributions." Pet. App. 40a.

Respondents contend that *NRWC* held only "that the 'members' whom a corporation could solicit for PAC contributions under § 441b did not include [certain individuals]." Br. in Opp. 14. But, as explained in the petition (at 9-10), that reading of *NRWC* fails to take into account the Court's extended consideration in *NRWC* of the broader "statutory prohibitions" on direct corporate campaign contributions. 459 U.S. at 208; see *id.* at 207-209. As Judge Gregory stated, although "*NRWC* dealt with the definition of 'members' for § 441b segregated fund solicitations purposes, * * * the *NRWC* Court's discussion of the exception cannot be so easily divorced from its discussion of the general rule." Pet. App. 38a. Indeed, as Judge Gregory concluded, "the Court's analysis [in *NRWC*] of the exception was largely determined by the need to give broad prophylactic effect to the ban on corporate contributions." *Ibid.*

Respondents' reading of *NRWC* also is at odds with this Court's own treatment of *NRWC*. For example, in *Federal Election Commission* v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985), the Court observed that *NRWC* "rightly concluded that Congress might include, along with labor unions and corporations *traditionally prohibited from making contributions to political candidates*, membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit." *Id.* at 500 (emphasis added). So too, in *MCFL* the Court specifically distinguished *NRWC* not because the case involved the definition of "members" for purposes of Section 441b, but because "the political activity at issue in [*NRWC*] was contributions," rather than (as in *MCFL*) independent expenditures. 479 U.S. at 259; see Pet. 10-11.

Respondents argue that "any distinction between independent expenditures and contributions is irrelevant, except that *limitations* [as opposed to bans] on contributions can be constitutionally justified," and that because *MCFL* invalidated a *ban* on independent expenditures as applied to certain nonprofit advocacy groups, a *ban* on campaign contributions is unconstitutional as applied to such corporations as well. Br. in Opp. 16 (emphasis added). But that argument fails to account for this Court's repeated statements that independent expenditures and campaign contributions are constitutionally different, and that, under the First Amendment, campaign contributions may be subjected to greater restrictions, including in appropriate circumstances a ban, than independent expenditures. See, *e.g.*, *Federal Election Commission* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (affirming that the Court's "cases have respected th[e] line between contributing and spending"); Pet. 11 (citing cases). Indeed, the Court in *MCFL* specifically emphasized the constitutional distinction between regulation of independent expenditures and campaign contributions in explaining the different outcomes in *NRWC* and *MCFL*. See 479 U.S. at 259-260, 261-262; Pet. 10-11.

Respondents argue that the decision below does not conflict with *NRWC* because it holds only that Section 441b is invalid as applied to the nonprofit corporation in this case (*i.e.*, North Carolina Right to Life, Inc.

(NCRL)), and not as applied to all nonprofit corporations. Br. in Opp. 15. But respondents' position is that NCRL is "an authentic MCFL-type corporation," *id.* at 7, and, as the dissent in *MCFL* recognized, the nonprofit corporation in *MCFL* was analogous to the one in *NRWC*. See 479 U.S. at 269 ("The corporation whose fund was at issue [in *NRWC*] was not unlike MCFL—a nonprofit corporation without capital stock, formed to educate the public on an issue of perceived public significance.") (Rehnquist, C.J., joined by White, Blackmun, and Stevens, JJ., concurring in part and dissenting in part).[1]

B. The Decision Below Creates A Circuit Conflict

Respondents devote only a paragraph to the circuit conflict created by the decision below and *Kentucky Right to Life, Inc.* v. *Terry*, 108 F.3d 637 (6th Cir.), cert. denied, 522 U.S. 860 (1997), and note simply that *Kentucky Right to Life* "involve[d] a state statute." Br. in Opp. 13. It is of course true that *Kentucky Right to Life* involved a challenge to a state law "prohibit[ing] nonprofit corporations from making direct contributions to candidates for political office." *Id.* at 645. But, as explained in the petition (at 12-13), the state prohibition in that case is directly analogous to the federal prohibition at issue here. Moreover, in upholding the state law in *Kentucky Right to Life*, the Sixth Circuit concluded that "the reasoning of *NRWC* applie[d] directly" to such a prohibition. 108 F.3d at 646; see *ibid.* ("Because the Supreme Court upheld broad federal prohibitions against direct corporate contributions as constitutionally permissible to limit potential corruption, we likewise uphold the * * * restrictions [in this case]."). Accordingly, as Judge Gregory recognized in his dissent, the decision below creates a conflict in the circuits over whether the type of prohibition at issue is constitutional. See Pet. App. 35a.

[1] Respondents "strongly object" to the statement in the petition that NCRL has "the 'primary purpose' of 'engaging in political advocacy.'" Br. in Opp. i n.1; see *id.* at 2-7. But respondents themselves state that "the Fourth Circuit correctly characterized the 'central energizing principle' of groups such as MCFL and NCRL as 'unabashedly political *and* expressive.'" Br. in Opp. 6 (quoting Pet. App. 6a (emphasis added by respondents)). In addition, respondents have argued throughout this litigation that NCRL is "just like" (Br. in Opp. 4) the nonprofit corporation in *MCFL*, *i.e.*, an organization "formed for the express purpose of promoting political ideas." *MCFL*, 479 U.S. at 264. And of course, respondents brought this action to seek relief from federal limitations on campaign contributions and expenditures. In any event, although NCRL does not qualify under the FEC's regulations for the exception recognized in *MCFL*, the FEC does not challenge for purposes of the petition for certiorari in this case the court of appeals' conclusion that NCRL is a "*MCFL*-type corporation." Pet. App. 34a. Rather, the FEC challenges the court of appeals' conclusion that Section 441b's prohibition on campaign contributions is unconstitutional as applied to such a corporation. See Pet. i.

C. There Is No Jurisdictional Impediment To Granting Certiorari

Respondents argue that jurisdiction is lacking on the ground that "the Solicitor General was not authorized to file the petition" by the FEC. Br. in Opp. 1; see *id.* at 7-13. That is incorrect. As this Court specifically recognized in *Federal Election Commission* v. *NRA Political Victory Fund*, 513 U.S. 88 (1994), Congress has authorized the Solicitor General "to conduct and argue the Federal Government's litigation in the Supreme Court," including litigation such as this on behalf of the FEC. *Id.* at 96 (citing 28 U.S.C. 518(a)); see *id.* at 93 (noting "Solicitor General's traditional role in

conducting and controlling all Supreme Court litigation on behalf of the United States and its agencies—a role that is critical to the proper management of Government litigation brought before this Court").

The Solicitor General's settled authority "to conduct" litigation on behalf of the Federal Government (and its agencies and officers) before the Supreme Court includes the authority to determine whether to seek review of a lower court decision. See *NRA Political Victory Fund*, 513 U.S. at 96 ("Whether review of a decision adverse to the Government in a court of appeals should be sought depends on a number of factors which do not lend themselves to easy categorization. The Government as a whole is apt to fare better if these decisions are concentrated in a single official."); *United States* v. *Providence Journal Co.*, 485 U.S. 693, 706 (1988) (describing the virtues of "centralization of the decision whether to seek certiorari" on behalf of the government); 28 C.F.R. 0.20(a) (The Solicitor General is responsible for "[c]onducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and * * * settlement thereof.").

In *NRA Political Victory Fund*, the Court held that, "[b]ecause the FEC lacks statutory authority to litigate this case in this Court, it necessarily follows that the FEC cannot independently file a petition for certiorari, but must receive the Solicitor General's authorization." 513 U.S. at 98. So too, when a federal agency like the FEC determines not to recommend that the Solicitor General seek certiorari on its behalf, the Solicitor General retains the authority to petition for certiorari on behalf of the agency when, as here, the agency lacks independent litigating authority in this Court. That is especially true when a decision invalidates, or calls into

question, the constitutionality of an important federal statute. Cf. 28 U.S.C. 2403(a) (allowing the United States to intervene to defend the constitutionality of an Act of Congress in any litigation in federal court in which the United States or a federal agency is not a party).[2]

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2002

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[2] In a similar vein, respondents argue that the Solicitor General may not file a petition for certiorari without consulting with the FEC, and that jurisdiction is lacking in this case because "[t]here is no representation by the Solicitor General that any consultation took place." Br. in Opp. 11. The regulation relied upon by respondents states that the Solicitor General should conduct litigation "in consultation with each agency or official concerned." 20 C.F.R. 0.20. But there is no requirement, much less any requirement affecting the jurisdiction of this Court, that the Solicitor General state in a petition for certiorari (or other brief) that such consultation took place, and no basis for presuming that the Solicitor General has not complied with any statutory or regulatory duty when such a representation is not made in a petition.